

EURO MORTGAGE

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Abstract

The unitary economical politics from monetary field had a considerable influence on the banking system. Economical harmonization and integration have actually the same purpose at the end: to create a compromise for the approach of national systems and to ease banking operations. Initially, the control politics of the capital international waves have been very important in the national plan of member states. Subsequently, there has been the phenomenon of the capital markets and payment means liberalization¹ and the Maastricht Treaty has brought important modifications in this aspect.

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European Central Bank setting up and introduction of euro currency had as purpose to destroy the intern barriers for the four fundamental liberties and to assure the prices stability, converting thus the euro area into an important actor of the world economy. Within community, the monetary politics and the economical one complete each other. Although the last one is a competence filed of the member states, the community control system contains common requirements. When the Council finds mistakes, issues between a national economical politics and the economical principles of the UE Treaty, it elaborates economical politics recommendations - the well known "multilateral surveillance system"³.

The complexity of the commercial field, has determined trade companies to promote its products also on other markets than the national ones. The cooperation and commercial representation relationships are often the ideal solution within an economy built on free competition, and the intensification of transfrontal commercial exchanges imposes an harmonization of the legislative settlement.

The Romania and Bulgaria joining on January, 1, 2007 has determined the pre-existent community construction of this event to add the European East civilization inside of a high level political and economical organization system. Europe takes its shape, where it will be done a re-analysis of the community priorities and of the institutional reforms modalities, in order that the geographical progression can be proportional with the achievement of the European Union aims. Within the actual international background, the economical field has an essential role for two important processes: integration and globalization.

¹ by CEE Treaty and Directive 361/88/CEE

² by CEE Treaty and Directive 361/88/CEE

³ Romanian Magazine of Community Law no. 4/2006, publishing Rosetti, Bucharest, p. 62

The evolution tendencies stress competition, implying the access to resources, the economical agents being forced to find out optimal solutions in order to face the continuous changes.

The harmonization of the judicial Romanian system with community disposition, complete the commercial connections among states, offering to its participants the needed legal protection. In Italy, the banking system reform, effected by Law 218/1990, has transformed the public law credit institutions into stock societies. Subsequently, the fiscal regime of banking reshaping operations has delegated the Italian government to realize a new reform in this field, introducing thus, fiscal advantages.

According to Romanian Law no. 58/1998, implying the banking activity, modified by the Law no. 485/2003, the banking activity is done by authorized credit institutions. Credit institution represents: a) the entity which carries on , with professional title, activity of drawing warehouse or other reimbursable funds from the public and of granting credits on own account ; b) the emitter entity of electronic currency, other than the one foreseen at “a” letter.

In Romania, the credit institutions can be set up and can operate as banks, cooperative credit organizations, emitter entity of electronic currency and savings bank for the locative domain. By special law, we can settle the foundation and the development of the activity by credit institutions, others than the ones presented, by respecting the Law principles concerning the banking activity from Romania. Banks can unfold, respecting the granted limit, also other activities permitted by legislation in force, as: drawing the investment societies and funds assets, distribution of participation titles at investment funds and action of investment societies, operating as Operator of Real estate Guarantee Electronic Archive, operations with metal and precious stones and objects manufactures with these ones, operations with delegation , processing data services, data bases management or other similar services for third parties, participation at the social capital of other entities. From the point of view of the banking management, it is very important to take in consideration the criteria influencing the organization method, the information system, the decisional process, as well as the appointment method of the lading staff.

Among the multinational banks there are the International Financial and Monetary Institutions, which have as common features the following: the capital consists of the Central Banks subscription from the states member; the management is assured by the member states governors; confers assistance and credits to the member states; supervises the functioning of the international banking – financial markets. The mixed banks are formed by the capital of two or several partners from different countries and they submit to the legislation from their residential country. The off- shore banks operate in certain free areas, which make only operations with non- residential individuals, assuring their anonymity.

The off-shore areas offers to the economical subjects the following priorities: fiscal facilities, a wide freedom, with no currency control, practically; the possibility to unfold operations with residents in any foreign currency; passing immediately the expenses to losses; anonymity, financial operations confidentiality.

The fields the banks are trained in are: retail banking, corporate banking, private banking, universal banking, investment banking. In the latest years, the financial performances have known an important economical development, internationally speaking. In most of the countries, the positive results appeared as a result of the

economical companies, especially of the banks. The economical advantages of the credit market development are, among others: a better variation of opportunities, the importance of completing the market, raising the clearances, risks diminution.

Services freedom in the banking or assurances field needs the liberalization of short time movements and respectively of assurance contract transfers.¹ The capitals movement liberalization has been made progressively, The Maastricht Treaty has not allowed the restrictions concerning the payments among the member states. The liberalization principle “*erga omnes*” refers to freedom among the member states but also the third parties countries. It needs a well determined fiscal control, in order to avoid the embezzlement, but without being a discrimination method or a restriction disguised against the free movement of capitals.

The supremacy of community law means that the european law is characterized by a superiority situation according to the entire intern juridical order. The supremacy attribute implies the fact that the community law removes from the application any contrary national stipulations. A free market economy supposes, among others, the trade freedom and the protection of the national economy, and creation of the necessary features for developing the quality of life.

In Switzerland, the State watches on the creation of a unit economical space and proclaims to fight against the damaging social and economical consequences of cartels and of other forms of limiting the competition. The State also takes into consideration the economical development specific to every random regime and cooperates with cantons and economical environments; it can derogate from the economical freedom principle in the credit and currency field, in the extern trade and public finances field, and establishes together with the communes and cantons the budget politics, according to the random situation. On the other side, it can force the enterprises to create crisis reserves, granting fiscal facilities and can also force the cantons to grant them, (when the reserves are free, the enterprises freely decide concerning their use, respecting the distributions foreseen by the law).

As the commercial liberalization progresses, it doesn't effect only trans-frontal issues, but also the ones from inside the frontiers. These might vary from the products settlement to the social and environment norms. By analyzing the EU decisional process in the extern trade field, it is important the connection between the operating capacity and the necessity of controlling, in the extern politics of the EU being included also the cooperation for development (financial assistance and credits). Among its objectives, the European Union must have in mind to continue to liberalize the trade, in order to establish the trust for the business environment within the world economy, as well as refreshing the disciplinary nature of the multilateral trade system. The economical motivation of the agents and promoting some advantageous payment techniques and methods in the banking system make that the European Union be often a predominant market for many countries, fact that determines that the intern evolutions of the EU are an important factor for their development and material conserving. Not lastly, the demand of an extern trade politics of the EU is determined by its importance within the international trade system.

¹ Banking Directive from 15.12.1989, respectively the Directive concerning the assurances from 08.11.1990

The European Justice Court has given a general definition¹ concerning the nationalization of electricity distribution and production in Italy. It considered that these kind of monopolies “ must have, on one side, as object transactions over a commercial good which could form the object of the competition and of the exchanges among the member States and, on the other side, they could play an effective role in these exchanges.” The competition reflects the free initiative of the economical agents and an appropriation of the market economy. The politics in the competition field is conceived and practiced in order to prevent or to destroy an unfaithful behavior from the part of the participants at the market mechanisms. The main reason of politics in the competition field is the desire to promote competition. Sometimes, the rules of monitor the competition environment do not offer many options to the participants and aimed objectives are incompatibles.²

The community competition politics has a direct meaning for the candidate- states, even before their joining, and independently from this event, the obligations assumed in this domain having a double innovation character: it refers to instruments unknown to the economies with centralized planning and represents the first international contractual obligations of the associated countries.

At the World Trade Organization level, the trade- competition report is one of the most sensitive components found on the agenda of the new generation of multilateral trade negotiations. In redefining the economical structures from various States, every authority and business environment have an important role by their vision. The integration of the financial capital market has been influenced by introducing the euro and the technology for distance access of the trade with financial titles. The location competition, especially among regions, for tangible mobile assets, has raised once with the integration of the market factors, together with the integration of the market services and goods.³

Community law and international law meet their efforts and complete their objectives in order to aim the international relations from politics sphere in law sphere. The existence of some parallel competence brings a “complementary form of interests” as well as a normative one, which approach the European Community of the international community. For the European Union, an East spread may be justified also by certain political- economical reasons (which , at their turn, will have, in application, connections with community judicial system): by integration, the East- European countries will be supported in maintaining the economical liberalism; the unity of the continent will be straighten , by vanishing the artificial boundaries created by some historical periods; The Eastern Europe , being a complex political space, will become a palliating conflict pressure region; by participation of the new members (who will enjoy a more balanced economy). By creating a commune European space, the European integration level is raising very quickly. The globalization phenomenon has also its effects on the national legislative backgrounds. By appearing the commune standards and regulations, there is a tendency of insisted harmonization of legislation. From the juridical point of view, The

¹ Decision from July 15, 1964 , cause Costa ENEL

² Dumitru Miron “ The European Union Economy, pub. Luceafarul , Bucharest, 2002, p. 256

³ Jacques Pelkmans “European integration . Methods and economical analysis” , European Institute from Romania, Bucharest, 2003, p. 199

contemporary Europe represents a potential field of important transformations, which have as a result the blur action of national boundaries, which tend to become a simple geographical delimitation. The economical reality and the European integration determine a progressive passing from national dimension to the community one, as well as new action with extraneousness character, which are more and more frequent. In the actual context of the exchanges liberalization, the transactions rapidity is a major concerning, which implies free movement of juridical acts and of the contracts in every member states from European Union. Within European Council held at Tampere (October, 15 and 16, 1999) the Union members established as main objective of the European construction, the creation of a freedom, security and justice space, expressing thus the will to create a Europe of the law.

In 1987, a commission of the International Union of the Latin Public Notary proposed (after the Switzerland pledge title – *Schuldbrief*), that besides the guarantee rights on the existent real estate property in the European States legislations, there should be instituted a pan – European mortgage. The guarantee right offered this way to the beneficiaries from EU would be better commercialized and free from the juridical and economical disadvantages of the accessory conventional mortgage.

Although the mortgage credits in the EU member states have a great importance, there is no international market of mortgage credits, one of the reasons being the different national judicial and legislative systems. There appeared the idea of “euro- mortgage”, a common additional of granting credits instrument in the European states¹. The markets of mortgage instruments of the new member states had totalized less than 2% from the European general mortgage business. In order to reach the level of the most developed community states, it needs an efficient legislative reform in the mortgage and real estate field, if we want to earn foreign investments and guarantee the real estate property (Poland has considerable progress in this way).

In 1998, The Allemandes Mortgage Banks Association proposed the establishment of a guarantee right non – accessory flexible, to be a reform in the field, in the central and east – European countries. This kind of right has been introduced in Estonia, Hungary and Slovenia, and law projects in Bosnia and Poland. In 2004, The “Forum” Group established by the European Commission, concerning the mortgage credit, defined euro-mortgage as an alternative instrument of the mortgage transfer facilitation, which would not seriously modify the law national systems. The idea has been studies also by the European University Institute from Florence, by the German Public Notary Institute and by many specialist university professors. Land Information European Service, established in 2002 contents 8 countries: Austria, England, and Wales, Finland, Lithuania, Holland, Norway, Scotland and Sweden. The project aim is the creation of a common internet portal in order to approach all land books from Europe. Euro – mortgage would be thus a national instrument, but with some commune norms, which economical value would depend upon the judicial system from very European country². The trans-frontal mortgage credit has still some issues with two contrary characteristics of the states

¹ Workshop held at Berlin, November 2004- April 2005, participating experts and specialists groups from all around Europe

² “Main principles for an euro- mortgage”, Credit mortgage foundation Varsovia”, 2005, pub. Notarom, Bucharest, 2005

systems - rigidity and flexibility. A flexible but certain mortgage would destroy these disadvantages if it was adapted to the modern requirements concerning real estate financing. The euro- mortgage could exist before concluding the credit contract or the credit payment. Thus, the bank cannot undertake the risk of a payment, with no guarantee right and we can reduce the time concerning the loan. After the obligation is reimbursed totally or partially, a new obligation may be guaranteed between the same parts, without creating a new mortgage, which may also lead to the costs reduction. The proceeding is also possible when the old obligation is replaced with a new one (the novation), the loan being able to be prolonged or replaced with another one, after the expiration of the fixed interest period. Several obligations of the same creditor may be also provided for, and it can be transferred to a new creditor for a new loan, since it is accessory.

In the economic field, the euro-mortgage encourages the development of new financing techniques and the simplification of the transfer means by means of the banks, thus diminishing the costs, the risk and the time. The applicable law of the euro-mortgage is "lex rei sitae"- the law of the member State where the property is located. The national law may request an agreement between the owner and the future euro-mortgage 's holder, as a request separately of its drawing up. With regards to the interest, this does not exist in the case of the euro-mortgage, though any of the members propose that the national law should establish the production of an interest diversely to the interest rate set up through the credit contract. The euro-mortgage cannot be sunk only by paying the guaranteed debts, but its radiation will be necessary , through the agreement of the parties, from the national register where it has been recorded. The fiscal costs collected by the state are the same as those for the local and foreign creditors , according to the European legislation, and in order to avoid double taxation the states will levy a tax only on the guaranteed and registered amount.

Taken into account the fact that more and more companies and physical persons (commercial and private beneficiaries) own real estates in several European states, a single mortgage could offer a lesser risk for the entire credit.

In the frame of the economic and financing environment, the liberalization of the capital movement has been performed in three steps: the liberalization of the capital operations (commercial credits or direct investments), the liberalization of the financing title operations (bonds, shares) and the liberalization of the financing loan operations and those of money market instruments. The conversions of the single market¹ have been pointed out by the intensification of the competition between the firms, the speed-up of the rhythm of the improvement in the competitiveness, the rapidity of the operations, the deprive the national monopolies of courage.

The European banking reform had as an institutional support the European System of the Central Banks (ESCB), including the European Central Bank and the central banks of the member states of the European Union. ECB pursues to prevent from the currency speculations, the coordination of the money and fiscal policy, the administration of the financing assets, the reduction to and the prevention from the risk of payment non execution, the avoidance of a disordered fluctuation in the interest rate, the setting up of a coherent fiscal policy. In such a system, the central liquidity creating banks, have a certain position of monopole. The enlargement of the European Union has represented a

¹ The program has been established by the White Chart of the European Commission in 1985.

major challenge and needed a careful strategic action, especially an institutional re-definition. The impact on the new members involves the elimination of the barriers in the commercial exchanges, the application of the competition policy, the access to the structural funding.

In the Quebec-Canadian law, there is a principle strictly respected, that is the patrimony of a physical person constitutes a common pledge of its chirographer creditors. As an exception, certain assets are deemed to be imperceptible (the assets necessary to the said person's profession and life, without he or she cannot live in their absence). In 1994, the civil law of Quebec, has simplified the regime of the guarantees recognized by the law. Thus, besides the pledge provided by the banking law and the mortgagee of the mercantile marine law, the main real guarantees are: the privileges, the credit sale, the redeem agreement sale (rarely met in practice) and the legal mortgage (arising out directly pursuant to the law, without being necessary to conclude an agreement). The conventional mortgage is a real right which saddles with a real estate or an asset, affected to the execution of an obligation. The parts who conclude the voluntary agreement are the mortgage constituent (the debtor) and the mortgage's holder (the beneficiary or the creditor). The mortgage has to comply with certain legal regulations essentially to the validity of the contract, and which belong to the nature of the private asset. The writ may be effected under the form of a private subscription instrument, when the object are only the assets, and when real estate is involved the authentic form is imperious.

In the case of the conventional mortgage a debtor's present assets are affected at one and the future ones – from the moment of their acquisition. The civil law of Quebec allows to any able person to alienate his assets, and to consent to a constitution of a guarantee. However, there are restrictive conditions for physical persons who want to conclude pledges. The merchants may pledge the company's assets that they run, the notion having a general definition from the economic considering, in order to allow a larger exercise of the said activity. The mortgage agreement may be constituted on the present and future assets (in Romania, the mortgage credit law also allows such credits for the execution of buildings performed subsequently to the credit award). A special derogation from the Canadian civil Act (code) (Quebec) refers to the fact that the income produced by a building –rents and coverage insurance indemnities and which, according to the legal norm are assets- represent the object of a real estate mortgage. Since the mortgage is redeemed through the disappearance of the asset- object (art.2795 civil act-Quebec), the debtor is obligated to insure the asset and the mortgage's holder-creditor becomes the beneficiary of the insurance indemnity.¹

In the Romanian legislation, simultaneously with the agreement of the parties, by means of a writ in authentic form, the mortgage will be transferred to another building, and the one on the initial building ceases its effects by law, at the date of the transcription of the new mortgage.

The rank of a mortgage on a future building will be determined by the moment of its transcription into the land register. The mortgage object will also include the existing servitude on the mortgaged asset. The papers concluded through the non observance of

¹ "Quebec, law notions and notary writ models"/ Quebec Notary Chamber, The National Union of the Romanian Public Notaries, Canadian Agency for International Development, ed. Notarom, Bucharest, 2005 p. 259.

the norms in force are affected by absolute nullity.¹ The cession of a mortgage debt becomes opposable against thirds who did not know – in other way, except the ceded debtor, through the transcription of the cession at the Electronic Archives of Real Estate Guarantees².

In general, the firm is a complex social and economic system, permanently influenced by the environment dynamics and the market features where the activity is performed. That's why, the crediting institutions have to modernize the demand facing strategies, the technology and the competition of the economic activity and by the quality of the methods have to cover in a great extent, the clients' needs. Some of them are aversive to risk, which determines hesitations to credit appealing.

The external environment uncertainty cannot be foreseen exactly, and thus the banks try to analyze the possible unpredictable influences and elements of the said environment. The fixation of some higher performance standards, by a qualified personnel, allows to certain banking institutions to enlarge them into the international business environment as well.

¹ Law N0. 34/1.03.2006 for the modification and completion of Law N0. 190/1999, as to the mortgage credit for asset investments, Official Monitor, N0. 200/03.03.2006

² Legislative Compendium in notary matter, volume I/Public Notaries Bulletin, ed. Notarom, Bucharest, 2006